STATE BAR OF CALIFORNIA
COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

AGENDA

OPEN SESSION

Friday, May 2, 2003
(9:30 am - 4:55 pm)

State Bar of California
1149 So. Hill Street, Room 723
Los Angeles, CA 90015
(213) 765-1000

[NOTE RE MEETING SITE: For members of the public, this meeting can also be accessed remotely by video-conference from the State Bar Office in San Francisco at 180 Howard Street, Room 8B. Members of the public who wish to access the meeting in this way are asked to call Audrey Hollins at 415-538-2167.]

I. APPROVAL OF OPEN SESSION ACTION SUMMARY FROM FEBRUARY 21-22, 2003 MEETING
(Materials distributed with March 28, 2003 assignment mailing.)

II. REMARKS OF CHAIR

A. Chair's Report
(Oral report. No materials provided.)

B. Staff's Report
(Materials enclosed (4/11/03 letter from the State Bar to the Hon. Darrell Steinberg re AB 1101).) ***[page 3]***

III. MATTERS FOR ACTION

Vapnek, Peck

A. Consideration of Rule 1-120X. New Rule Proposal Arising from Discussion of Rule 1-120 re Incorporating Case Law and B&P Code Provisions [anticipated 1-hour discussion]
(Materials to be distributed by codrafters prior to meeting.)

Voogd

B. Consideration of Proposed New Rule re "Recording Time"
(Materials enclosed (4/16/03 memo from Tony Voogd).)
[page 4]

Tuft
Betzner,
Martinez,
Peck

C. Consideration of Rules: 1-300 (Unauthorized Practice of Law); 1-310 (Forming a Partnership With a Non-Lawyer); 1-320 (Financial Arrangements With Non-Lawyers); and 1-600 (Legal Service Programs) [anticipated 1 and ½ hour discussion]
(Materials enclosed (3/25/03 memo from Tony Voogd re rules 1-310 and 1-320) and additional materials to be distributed by codrafters prior to meeting.)
[pages 5 - 11]

Voogd
Lamport

D. Consideration of Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
[anticipated 1 hour discussion]
(Materials enclosed (4/7/03 memo from Tony Voogd re rule 1-311).)
[pages 12 - 19]

George,
Julien,
Ruvolo

E. Consideration of Rule 1-400. Advertising and Solicitation
[anticipated 1 and ½ hour discussion]
(Materials enclosed (4/15/03 memo from JoElla Julien, 4/17/03 memo from Ed George and 4/18/03 memo from Tony Voogd re rule 1-400).)
[pages 20 - 40]

State Bar of California
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April 11, 2003

The Hon. Darrell Steinberg
Member of the Assembly, 9th District
State Capitol, Room 2114
Sacramento, CA 95814

AB 1101, as amended 4/10/03 – SUPPORT
State Bar Board of Governors

Dear Assembly Member Steinberg:

The State Bar's Board of Governors is pleased to support your AB 1101, which would provide a narrow, limited, and permissive exemption to an attorney's statutory duty of confidentiality in cases where the attorney reasonably believes that disclosure is necessary to prevent a criminal act that will result in the death of, or great bodily injury to, an individual.

The Board believes that AB 1101clarifies an important public protection policy that appropriately balances interests in maintaining attorney-client confidentiality and prevention of consequences to others that are so serious that they outweigh interests in confidentiality.

If you have any questions concerning the Board of Governors' support for AB 1101, please feel free to contact me or Randall Difuntorum, Director of Professional Competence Programs at (415) 538-2161.

Thank you.

Best Regards,

Larry Doyle
Chief Legislative Counsel

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INTER-OFFICE MEMORANDUM

TO: THE MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: NEW RULE -RECORDING TIME
DATE: 4/16/03

The following draft of a proposed new rule is submitted for consideration by the Commission agreeably with Harry's invitation of some time ago:

Recording Time. A member shall maintain accurate records of time expended on legal services for a client where the member's fee is based in whole or in part upon the time expended by the member or where the client requests the maintenance of such records. Such records shall be founded upon written or electronic notations made contemporaneously with expending the time and shall briefly describe the particular services provided. Copies of such records shall be provided to the client promptly upon request.

Keeping accurate track of time expended is a fundamental professional obligation where the fee is founded upon time expended. Even where the fee is not time based, the obligation of the member to account for work performed on behalf of the client arises out of the fiduciary duty owed the client. Moreover, it provides a means for the client to insure that the employment is being pursued diligently by the member.

The proposed rule does not impose a substantial burden upon members. Most lawyers maintain such records as a matter of course. Regrettably, many lawyers don't keep such records to the detriment of their clients.

The proposed rule will protect the reasonable interests of the public.

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INTER-OFFICE MEMORANDUM

TO: MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: RULES 1-310 AND 1-320
DATE: 3/25/03

Purpose of this Memorandum

During out discussions of Rule 1-100A, I opined that the purpose of the Rules was to protect the interests of the profession. Hammered by public interest language in various Supreme Court decisions, I acquiesced to the inclusion of protection of the public provision in the Rule. Moreover, I promised to be a vigorous advocate of the public interest in our consideration of other rules.

Agreeably with that commitment, this memo describes in greater detail my belief that the public interest requires that Rules 1-310 and 1-320(A) be abrogated.

Rule 1-310 (Forming a Partnership with a Non-Lawyer)

Rule 1-310 limits the manner in which legal services can be provided. It prevents the establishment of legal services businesses that depart from the traditional structures of practice such as legal partnerships. If Rule 1-310 is abolished, I believe that a variety of entities may hire lawyers and enter the business of providing legal services. Such entities may include accounting firms, Sears, Wal-Mart, or any of a variety of businesses that believe they can provide high-quality legal services at a reasonable profit. Such businesses may pursue niche markets such as unlawful detainer or

bankruptcy. Indeed, such legal services businesses should accord perfectly with developing limited practice concepts.

The Commission should recognize that Rule 1-310 is anti-competitive. It is the vehicle whereby lawyers effectively monopolize the business of providing legal services. I have no quarrel with Kurt's comments that the State Bar has an exemption from ant-trust liability under the doctrine of Parker v. Brown, 317 U.S. 341 (1943). But that does not mean we should ignore the logic and public interest aspects of anti-trust law.

In United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945), Learned Hand stated:

> "Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift, and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. Such people believe that competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them."

The science of economics teaches that there can be no quarrel with these considerations, and that they are equally applicable to the provision of services.

Notwithstanding its anti-competitive impact, Rule 1-310 is justified by its presumed prophylactic effect. Arguably, it prevents non-lawyers from interfering with the independent professional judgment of lawyers. I have difficulty with this justification.

Independent professional judgment as a value is difficult to define. As Stan stated, it is like smoke in a bottle, and, if framed as an independent rule, the rule requirement would be unenforceable by reason of its uncertainty. I question whether such an amorphous concept requires the powerful protection provided by the Rule.

A different way of expressing the value might be to say that a lawyer who exercises independent professional judgment complies with the other rules of professional

conduct. If that were the value, then it would appear there is no need for the independent, prophylactic, protection of Rule 1-310.

Another way of looking at the value is to consider the beneficiary of the lawyer's exercise of independent professional judgment. If the beneficiary is the public generally, then I think the Rule justification collapses. There was some talk at the last meeting about Enron, Worldcom and Adelphia. Their nefarious schemes were implemented through the legal documentation provided by prestigious law firms. If prominent law firms can so readily run roughshod over the interests of the public then there is small justification for outlawing legal services businesses on the basis they may do the same.

The concern regarding independent professional judgment seems to be directed more toward protection of the client. For instance, the concern might be that the non-lawyer would tell the lawyer the following: "I don't care what you think about the merits of this contingency case, talk the client into dismissing the matter. I don't want to spend any more money on it." My problem with the concern is the presupposition that the lawyer will be spineless and acquiesce in the demand of the non-lawyer notwithstanding his obligations under the Rules. And, in any event, the concern is equally applicable to traditional law firms. A partner might make a like statement to an associate. Finally, if the concern has merit, it can be the subject of an independent rule addressing the particular vice, not a justification for a rule foreclosing innovation in the possible forms of organizations providing legal services.

MR 5.4(c) provides a model for such a rule: "A member [lawyer] shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the member's [lawyer's] professional judgment in rendering such legal services."

Another, lower level, concern might by a statement by the non-lawyer to the lawyer: "We will not take any depositions exceeding one hour." The lawyer might be less inclined to fight the non-lawyer on an issue of this nature. On the other hand, is such a restriction necessarily wrong? It may accord with the client's desire to avoid paying fees. Moreover, it might be a proper restriction if, as we probably will, agree to some

form of rule relating to the provision of limited legal services and the legal services business properly limits the scope of its work under that rule.

Some argue that the Rule is essential to the preservation of the confidences and secrets of clients. This is nonsense. Literally thousands of non-lawyers already have access to confidential information in California. They are the secretaries, paralegals, investigators and other support personnel needed for the efficient provision of legal services. There is no reason to believe that adding a few non-lawyer partners will destroy the professions "core value" of confidentiality. Indeed, non-lawyer partners are more likely to protect confidential information because they will recognize that disclosure may destroy their business investment.

Mark was correct when he suggested that Rule 3-110 is hoary. Maybe the Rule made sense when the Bar was more of a true profession. However, the practice of law is no longer a profession. It is big business and it should be subject to the same competitive forces that drive down prices in other businesses. Moreover, when the rules were established, advertising was unlawful. If independent professional judgment is a value desired by the public, traditional law firms can advertise their capacity to provide such judgment.

Legal services are enormously expensive. We all recognize that such expense limits access to such services. We also recognize that there isn't much by way of price competition in the profession. Moreover, as ethicists we piously suggest that lawyers should address the problem by providing free legal services, a suggestion that for the most part is ignored by the profession. Why not follow a course that has a reasonable prospect of truly benefiting the public through lower fees?

There is an element of professional arrogance in Rule 1-310. The Bar is telling the public that they are going to get independent professional judgment whether they want it or not and regardless of cost. Stated differently, the public is going to get a piece of this pie, pay for it and eat it because lawyers know better than the public about what the public must have. Rule 1-310 runs roughshod over the rights of the public to make reasonable choices on their own behalf.

I am the General Counsel of a corporation and consider myself a knowledgeable purchaser of legal services. Other lawyers and non-lawyers, employed by corporations, governmental agencies, insurance companies or other large organizations, are equally or more discerning in purchasing legal services. Considering the cost of legal services, I wouldn't be surprised if such purchasers contract for over 50% of all legal services sold in California. The Bar is telling such purchasers that we can't buy legal services from a partnership including a non-lawyer because of the risk that we will be snookered by the non-lawyer partner.

The July 7th, 2001 issue of The Economist, pages 64 to 66, included a Special Report on Professional-service firms. The report stated:

> "American lawyers plead that their work is special and their need for confidentiality and independence so great that the proximity of more commercially minded professionals might compromise it. But it doesn't take Adam Smith to smell a rat there. In May 1999, Robert Gordon, a professor of law at Yale, wrote to the ABA in his submission about MDPs: 'Historically, the sad if hardly surprising fact has been that the organised Bar's resistance to new modes of practice has been to a considerable extent motivated by desires to protect the incomes of lawyers from economic competition or their status from erosion by groups perceived as interlopers.'"

There is always an element of conflict of interest involved in lawyers evaluating rules governing lawyer conduct. Conflict considerations should make the Commission particularly queasy with regard to assessing the public interest aspects of Rule 1-310.

The concept of abrogating the Rule is not new. As Mark noted, the Kutak Commission came to a similar conclusion as evidenced by their draft Rule 5.4 (Proposed Final Draft 1981). That version would have permitted a lawyer to "be employed by an organization in which a financial interest is held or managerial authority is exercised by a non-lawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency" so long as the organization provided written guarantees of

compliant with the rules on professional independence, client confidentiality, advertising and solicitation, and fees. Wolfram, Modern Legal Ethics, 1986 ed., §16.2, p. 879.

Similar issues were addressed in the June 29, 2001, Report and Findings of the State Bar of California Task Force on Multidisciplinary Practice. In my opinion, the report is a hagiography extolling the legal profession and its "core values" while failing to smell the rat. Moreover, MDP as defined only involves offering both legal and non-legal professional services to the public. Rule 1-310 involves partnerships between lawyers and non-lawyers generally. I think a lawyer should be able to enter into a partnership with his janitor if he so desires. Let the public decide if they want to buy legal services from such a partnership.

Rule 1-320 (Financial Arrangements with Non–Lawyers)

Rule 1-320(A) provides "Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer, except …." In my opinion, this rule is nothing more than the Bar's second strike capability against competition; it should be abrogated.

As Raul has pointed out, the traditional justification for a rule against fee splitting is to assure control of litigation by the lawyer, to discourage solicitation by lay intermediaries and to protect clients from unreasonably high fees. The lawyer control justification is simply another variant of the independent professional judgment argument discussed above.

Subparts (B) and (C) of Rule 1-320 address the vice of solicitation. These subparts probably should be moved to Rule 1-400 (Advertising and Solicitation). Improper solicitation can occur in the absence of what is currently condemned as fee splitting. See Unlawful Solicitation, B&P §§6150 through 6154, relating to runners and cappers. Moreover, fee splitting does not necessarily lead to solicitation. Emmons, Williams, Mires & Leech v. State Bar, 6 Cal.App.3d 565 (1970).

The third justification is protection of the public against high fees. This concern is adequately addressed in Rule 2-200 relating to fee splitting among lawyers. Moreover,

this justification doesn't make economic sense in the context of legal services businesses. Further, the proper place to address improperly high fees is Rule 4-200. Finally, it worth noting that a client may agree to fee splitting among lawyers. However, if you move outside the monopoly, client consent is meaningless.

Apart from competitive considerations, Rule 1-320(A) should be abrogated because it is so poorly drafted. It fails to adequately define the vice condemned.

Consider the wholly innocuous conduct of the lawyer paying a salary to his secretary. The origin of the salary would legal fees earned by the lawyer and, in the normal course, the secretary would be a non-lawyer. Moreover, the payment of the secretary's salary does not appear in the exceptions to subpart (A). Accordingly, a lawyer paying his or her secretary violates the rule unless you can ascribe some special and peculiar meaning to the word "share." And any such special meaning is effectively foreclosed by the words "directly or indirectly."

Wolfram in Modern Legal Ethics, 1986 ed., §9.2.4, p. 510, states that paying employees or suppliers does not violate the fee splitting rule as a matter of "convention." But we cannot rely on convention. Our charter provides that we are to: "Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules."

If we clarify the rule, where do we draw the line? If salaries are permissible, it follows that a bonus would also be permissible. The generality of the rule reflects its inherent anti-competitive motive. Once you get specific, it is going to be very easy to avoid the thrust of the rule.

Finally, Justice Wiener's opinion in Ojeda v. Sharp Cabrillo Hospital, 8 CalApp.4th 1 (1992), is the best reason for abrogating Rule 1-320(A). He gave the rule remarkably short shrift.

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INTER-OFFICE MEMORANDUM

TO: MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: RULE 1-311
DATE: 4/7/03

1. Introduction

Rule 1-311 is set forth at length in the following section of this document. Copies of the red bound Request that the Supreme Court of California Approve Proposed Rule 1-311 of the Rules of Professional Conduct of the State Bar of California and Memorandum and Supporting Documents in Explanation (the "Memorandum") were provided to Members of the Commission at the commencement of its present assignment.

2. The Rule

Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member.

(A) For purposes of this rule:

(1) "Employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid;

(2) "Involuntarily inactive member" means a member who is ineligible to practice law as a result of action taken pursuant to Business and Professions Code sections

6007 [involuntary enrollment as an inactive member], 6203(c) [typographical error, should be 6203(d)(1), attorney placed on involuntary inactive status by reason of failure to comply with an arbitration refund of costs of fees award], or California Rule of Court 958(d) [members who fail to comply with MCLE are enrolled as inactive members]; and

(3) "Resigned member" means a member who has resigned from the State Bar while disciplinary charges are pending.

(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:

(1) Render legal consultation or advice to the client;

(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) Appear as a representative of the client at a deposition or other discovery matter;

(4) Negotiate or transact any matter for or on behalf of the client with third parties;

(5) Receive, disburse or otherwise handle the client's funds; or

(6) Engage in activities which constitute the practice of law.

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities, including but not limited to:

(1) Legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) Direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or

(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.

(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Discussion:

For discussion of the activities that constitute the practice of law, see Farnham v. State Bar (1976) 17 Cal.3d 605 [131 Cal.Rptr. 611]; Bluestein v. State Bar (1974) 13 Cal.3d 162 [118 Cal.Rptr. 175]; Baron v. City of Los Angeles (1970) 2 Cal.3d 535 [86 Cal.Rptr. 673]; Crawford v. State Bar (1960) 54 Cal.2d 659 [7 Cal.Rptr. 746]; People v. Merchants Protective Corporation (1922) 189 Cal. 531, 535 [209 P. 363]; People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599 [264 Cal.Rptr. 548]; and People v. Sipper (1943) 61 Cal.App.2d Supp. 844 [142 P.2d 960].)

Paragraph (D) is not intended to prevent or discourage a member from fully discussing with the client the activities that will be performed by the disbarred, suspended, resigned, or involuntarily inactive member on the client's matter. If a member's client is an organization, then the written notice required by paragraph (D) shall be served upon the highest authorized officer, employee, or constituent overseeing the particular engagement. (See rule 3-600 [organization as client].)

Nothing in rule 1-311 shall be deemed to limit or preclude any activity engaged in pursuant to rules 983 [counsel pro hac vice], 983.1 appearances by military counsel], 983.2 [certified law students], and 988 [registered foreign legal consultant] of the California Rules of Court, or any local rule of a federal district court concerning admission pro hac vice. (Added by order of the Supreme Court, effective August 1, 1996.)

3. Purpose of the Rule

The Memorandum, p. 2, states:

> "The primary goal of proposed rule 1-311 is to ensure that a disbarred, suspended, resigned, or involuntarily inactive member of the State Bar does not become an employee of or associate with an active member and thereafter continue to perform substantially the same activities that the disbarred, suspended, resigned, or involuntarily inactive member performed previously as an active member."

Obviously, disbarred, suspended, resigned, or involuntarily inactive member of the State Bar ("former members") should not continue to practice law. However, former members have every inclination to try to use their specialized training for purposes of earning a living. Moreover, existing members have a strong inclination to use them as a cheap source of legal services.

Accordingly, former members have continued to practice in the twilight zone between what is clearly the practice of law of what is clearly not the practice of law. This twilight zone practice has given rise to Rule 3-111.

In my opinion, Rule 3-111 would not be necessary if there was a bright line test clearly differentiating between what is and isn't the practice of law. In a sense, it is a symptom of the more fundamental problem of the absence of a sensible definition of what constitutes the practice of law. Since Rule 3-111 addresses an artificial problem, it is not surprising that it is prolix and redundant of other like prohibitions.

4. Definition the Practice Law

For what it is worth, it is relatively easy to derive a rough definition of what constitutes the practice of law from Rule 1-311. Subpart (B) describes what is the practice of law; subpart (C) describes what is not the practice of law. The interstices are filled through reference to the cases described in the Discussion. The definition arguably has the imprimatur of the Supreme Court through its approval of the rule.

5. Objections to the Rule.

I doubt whether any other rule adopted by the Board of Governors and approved by the Supreme Court has generated as much disapprobation. Versions A through E generated continuing objections. Objections written by JoEllen Julien and Jerry Sapiro were particularly profound. Many of the objections appearing in the Memorandum are set forth below:

- the proposed rule is unnecessary - the provisions of proposed rule 1-311 are already covered by existing statutes and rules, namely, B&P §§ 6068(m), 6093, 6125-6127 & 6133, Rules of Professional Conduct 1-110, 1-300, & 3-500.

- the State Bar has failed to identify any example of unauthorized practice, or aiding and abetting which cannot be adequately prosecuted under existing rule.
- The proposed rule would restrict disbarred, suspended or involuntarily inactive attorney from engaging in certain activities which other non-attorneys are free to perform.
- the proposed rule would require notification to clients where the services to be performed do no involve legal services, such as those typically performed by non-lawyers in business setting such as banks, escrow companies. messenger services, and other professions - such notice provision will discourage potential employers from hiring the disciplined attorney.
- adjusting personal injury claims is commonly undertaken by non-attorney insurance company employees, yet a law would be disciplined under the proposed rule for allowing a suspended attorney employee to do so.
- adding additional administrative burdens on the practicing bar, especially when existing law and rules cover the subject matter, should be avoided.
- the efforts of suspended or disbarred attorneys to demonstrate rehabilitation and continue knowledge of the law, as required for reinstatement to practice would be unduly inhibited, if not precluded entirely, by the proposed rule.

As more particularly appears from the Memorandum, these and other objections were rejected after consideration by the Board of Governors and the Supreme Court, and the Rule became effective in 1996. I think it too soon to present to the Board and Court changes founded upon similar objections.

5. Proposed Changes

As noted above, (A)(2) contains a typographical error, "6203(c)" should be "6203(d)(1)."

I asked Randy for exemplars of notices submitted by lawyers agreeably with the requirements of (D). I was advised that I could not see such notices since they were confidential under State Bar rules. This doesn't make sense to me since because secrecy defeats the purpose of the rule. Accordingly, consideration should be given to revising (D) in the manner indicated by the underlined language appearing below:

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. <u>The information contained in such notices shall be available to the public</u>. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.

Hopefully, ending the secrecy will not impose an unreasonable administrative burden upon the State Bar.

A copy of the State Bar forms to be used pursuant to (D) was enclosed at pages 117 through 119 of the February 2003 agenda materials. Arguably, the forms don't comply with the requirement that the written notice include "a full description of such person's current bar status." Former members are described in the alternative, i.e. "a disbarred, resigned, suspended or involuntarily inactive member of the State Bar of California." A client receiving such a notice might regard it as innocuous, thinking, for example, that the lawyer handling his work has resigned his formal membership and is pursuing legal work on a part time basis.

The State Bar should consider changing the form such that it fully describes that status of the former member in the same manner used in the reports of discipline appearing in various legal periodicals, for instance "_____ was summarily disbarred following his November 2001 conviction for grand theft" or "_____ resigned from the bar on August 22, 2001 with unspecified disciplinary charges pending."

Finally, if we succeed in establishing a clear definition of the practice of law we might consider abrogating Rule 3-111.

----- Original Message -----
From: CommissionerJ2@aol.com

To: epgeorge@ix.netcom.com

Cc: justice.ruvolo@jud.ca.gov ; hbsondheim@earthlink.net ; lauren.mccurdy@calbar.ca.gov

Sent: Tuesday, April 15, 2003 11:15 PM

Subject: 1-400

To: Ed George

I note you are our leader on 1-400 so herein attached is my contribution to our effort with copies to Judge Ruvolo and others.

1-400 Advertising and Solicitation

My general comments:

First, I was surprised upon reading this rule again that it was so long and, in my opinion redundant. I must admit, however, that I am a bit short on experience on this one not having heard nor read any complaints regarding this rule. I take note of the fact that there was only one comment in our materials. I am not sure if this means that the rule is working well or that no one has complained about its abuse.

If, there are no problems with this rule, I suggest we leave it as it is. If there are problems with complicity, then we need to change it, and I need to know what the issues are so I can contribute intelligently to its change. If I were queen of the rule making world, I would strive for brevity because I think most of the definitions simply explicate those "communications" which are false and/or misleading. Witness D 1, 2, 3, and 6.

I am not sure why this rule has "standards" rather than a discussion. Perhaps someone else can enlighten me.

Generally, I like the positive approach, i.e., a member *may* advertise written, recorded, electronic communication. Such a communication may not be false or misleading. Therefore, I would rewrite the rule thusly,

- {Retain all}
- {Retain all}
- {Retain all}
- {Retain only 4 and 5 as the rest seem to be either false or misleading and to tell members this is a redundancy.}

· {I do not understand why this is here {and in the 1989 rules}unless someone somewhere mandated that the Commission tell the Board of Governors what to do.
· This should be deleted with perhaps the exception of the historical fact on the last paragraph.

Even after all of this I do have one remaining question:

Is the difference between standard 5 and 1-400B-1) ***primarily*** pecuniary gain vs professional pecuniary gain?

MEMORANDUM

Date: April 17, 2003

To: Members of the Commission

From: Edward P. George

Subject: Rule 1-400 Rules of Professional Conduct: Advertising and Solicitation

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A. Background:

To fully understand the background to Rule 1-400, it may be helpful to review and compare Rules 7.1–7.5 of the 1983 ABA Model Rules, Rules 7.1–7.5 of the 2003 ABA Model Rules, California Rule 1-400, and Business and Professions Code section 6157, et seq. and section 6158, et seq.

1. ABA Model Rules (1983, as amended):

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Rule 7.2 Advertising

(a) Subject to the requirements of rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.

(b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a signaificant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written or recorded communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter, and with whom the lawyer has no family or prior professional relationship, shall include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded communication.

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.4 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

(a) a lawyer admitted to engage in patent practice before the United States Patent and Trademarks Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) a lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation;. and

(c) [for jurisdictions where there is a regulatory authority granting certification or approving organizations that grant certification] a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization or authority but only if:

(1) such certification is granted by the appropriate regulatory authority or by an organization which has been approved by the appropriate regulatory authority to grant such certification; or

(2) such certification is granted by an organization that has not yet been approved by, or has been denied the approval available from, the appropriate regulatory authority, and the absence or denial of approval is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.

(c) [for jurisdictions where there is no procedure either for certification of specialties or for approval of organizations granting certification] a lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in this jurisdiction for approving certifying organizations. If, however, the named organization has been accredited by the American Bar Association to certify lawyers as specialists in a particular field of law, the communication need not contain such a statement.

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

2. ABA Model Rules (2003)[1]

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

[1] ABA Model Rules (2003), as to Rules 7.1–7.5, are the same model rules as ABA Model Rules (2002), with the single exception of ABA Model Rule 7.2, which added (b)(4)(i)(ii) to this model rule 2003.

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Rule 7.4 Communication of Fields of Practice

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

Rule 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

3. California Rule 1-400 - Advertising and Solicitation

(A) For purposes of this rule, "communication" means any message or offer made by or on behalf of a member concerning the availability for professional employment

of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following:

(1) Any use of firm name, trade name, fictitious name, or other professional designation of such member or law firm; or
(2) Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such member, law firm, or lawyers; or
(3) Any advertisement (regardless of medium) of such member or law firm directed to the general public or any substantial portion thereof; or
(4) Any unsolicited correspondence from a member or law firm directed to any person or entity.

(B) For purposes of this rule, a "solicitation" means any communication:
(1) Concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain; and
(2) Which is;
(a) delivered in person or by telephone, or
(b) directed by any means to a person known to the sender to be represented by counsel in a matter which is a subject of the communication.

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

(D) A communication or a solicitation (as defined herein) shall not:
(1) Contain any untrue statement; or
(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive, or mislead the public; or
(3) Omit to state any fact necessary to make the statements made, in the light of circumstances under which they are made, not misleading to the public; or
(4) Fail to indicate clearly, expressly, or by context, that it is a communication or solicitation, as the case may be; or
(5) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.
(6) State that a member is a "certified specialist" unless the member holds a current certificate as a specialist issued by the Board of Legal Specialization,

or any other entity accredited by the State Bar to designate specialists pursuant to standards adopted by the Board of Governors, and states the complete name of the entity which granted certification.

(E) The Board of Governors of the State Bar shall formulate and adopt standards as to communications which will be presumed to violate this rule 1-400. The standards shall only be used as presumptions affecting the burden of proof in disciplinary proceedings involving alleged violations of these rules. "presumption affecting the burden of proof" means that presumption defined in Evidence Code sections 605 and 606. Such standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on all members.

(F) A member shall retain for two years a true and correct copy or recording of any communication made by written or electronic media. Upon written request, the member shall make any such copy or recording available to the State Bar, and, if requested, shall provide to the State Bar evidence to support any factual or objective claim contained in the communication.

(Former rule 1-400 (D)(6) repealed by order of the Supreme Court effective November 30, 1992. New rule 1-400 (D)(6) added by order of the Supreme Court effective June 1, 1997.)

Standards:

Pursuant to rule 1-400(E) the Board of Governors of the State Bar has adopted the following standards, effective May 27, 1989, unless noted otherwise, as forms of "communication" defined in rule 1-400(A) which are presumed to be in violation of rule 1-400:

(1) A "communication" which contains guarantees, warranties, or predictions regarding the result of the representation.

(2) A "communication" which contains testimonials about or endorsements of a member unless such communication also contains an express disclaimer such as "this testimonial or endorsement does not constitute a guarantee, warranty, or prediction regarding the outcome of your legal matter."

(3) A "communication" which is delivered to a potential client whom the member knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.

(4) A "communication" which is transmitted at the scene of an accident or at or en route to a hospital, emergency care center, or other health care facility.

(5) A "communication," except professional announcements, seeking professional employment for pecuniary gain, which is transmitted by mail or equivalent means which does not bear the word "Advertisement," "Newsletter" or words of similar import in 12 point print on the first page. If such communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the envelope shall bear the word "Advertisement," "Newsletter" or words of similar import on the outside thereof.

(6) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or non-profit legal services organization.

(7) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation which states or implies that a member has a relationship to any other lawyer or a law firm as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172 unless such relationship in fact exists.

(8) A "communication" which states or implies that a member or law firm is "of counsel" to another lawyer or a law firm unless the former has a relationship with the latter (other than as a partner or associate, or officer or shareholder pursuant to Business and professions Code sections 6160-6172) which is close, personal, continuous, and regular.

(9) A "communication" in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice which differs materially from any other such designation used by such member or law firm at the same time in the same community.

(10) A "communication" which implies that the member or law firm is participating in a lawyer referral service which has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case.

(11) A "communication" which states or implies that a member is a "certified specialist" unless such communication also states the complete name of the entity which granted the certification as a specialist. (Repealed by order of the Supreme Court, effective June 1, 1997. See rule 1-400(D)(6).)

(12) A "communication," except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain transmitted to the general public or any substantial portion thereof by mail or equivalent means or by means of television, radio, newspaper, magazine or other form of commercial mass media which does not state the name of the member responsible for the communication. When the communication is made on behalf of a law firm, the communication shall state the name of at least one member responsible for it.

(13) A "communication" which contains a dramatization unless such communication contains a disclaimer which states "this is a dramatization" or words of similar import.

(14) A "communication" which states or implies "no fee without recovery" unless such communication also expressly discloses whether or not the client will be liable for costs.

(15) A "communication" which states or implies that a member is able to provide legal services in a language other than English unless the member can actually provide

legal services in such language or the communication also states in the language of the communication (a) the employment title of the person who speaks such language and (b) that the person is not a member of the State Bar of California, if that is the case.

(16) An unsolicited "communication" transmitted to the general public or any substantial portion thereof primarily directed to seeking professional employment primarily for pecuniary gain which sets forth a specific fee or range of fees for a particular service where, in fact, the member charges a greater fee than advertised in such communication within a period of 90 days following dissemination of such communication, unless such communication expressly specifies a shorter period of time regarding the advertised fee. Where the communication is published in the classified or "yellow pages" section of telephone, business or legal directories or in other media not published more frequently than once a year, the member shall conform to the advertised fee for a period of one year from initial publication, unless such communication expressly specifies a shorter period of time regarding the advertised fee.

(Amended by order of Supreme Court, operative September 14, 1992. Standard (5) amended by the Board of Governors, effective May 11, 1994. Standards (12) - (16) added by the Board of Governors, effective May 11, 1994.)

4. Business and Professions Code section 6157, et seq. and Business and Professions Code section 6158, et seq.[2]

In 1993, the Legislature created a comprehensive, regulatory scheme concerning advertising by attorneys. The Legislature added a new article entitled, "Legal Advertising," to the Business and Professions Code. (B&P C. 6157 et seq.) In 1994, the Legislature added additional requirements with respect to advertising in the electronic media. (B&P C. 6158 et seq.)

The article applies generally to lawyers, members, law partnerships, law corporations, lawyer referral services, advertising collectives, cooperatives, or other individuals, including nonlawyers, or groups advertising the availability of legal services. (B&P C. 6158.5.)

Business and Professions Code sections 6157-6158 also do not limit the right of advertising protected by the federal or state constitution. (B&P C. 6159.2(b).)

"Electronic medium" is defined as television, radio or computer networks. (B&P C. 6157(d).)

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[2] The author has quoted liberally from Witkin, California Procedure, 4th Ed., "Legal Advertising," §63, pp. 85-90.

Business and Professions Code section 6157.1 prohibits any advertisement that may contain "any false, misleading, or deceptive statement or omit to state any fact necessary to make the statements made, in light of circumstances under which they are made, not false, misleading, or deceptive." There are additional prohibitions as to an advertisement referred to in Business and Professions Code section 6157.2, et seq.

Regarding "electronic media," the message must comply with Business and Professions Code sections 6157.1 and 6157.2, as a whole, considering the combined effect of words, sounds, background, action, symbols, visual image, or other techniques, may not be false, misleading, or deceptive, and must be factually substantiated, i.e., capable of verification by a credible source. (B&P C. 6158.)

There is a rebuttable presumption, affecting the burden of producing evidence, that the following messages are false, misleading, or deceptive within the meaning of Business and Professions Code section 6158:

(1) A message as to the ultimate result of a specific case or cases presented out of context without adequate information as to the facts or law giving rise to the result. (B&P C. 6158.1(a).)

(2) Depiction of an event through methods such as displays of injuries, accident scenes, or portrayals of other injurious events (whether or not accompanied by sound effects) which may give rise to a claim for compensation. (B&P C. 6158.1(b).)

(3) A message referring to or implying money received by or for a client in a particular case or cases, or to potential monetary recovery for a prospective client, including references to a specific dollar amount, characterization of a sum of money, monetary symbols, or the implication of wealth. (B&P C. 6158.1(c).)

Under Business and Professions Code section 6158.2, the following information is presumed to be in compliance with the requirements for advertising by electronic media, provided the message as a whole is not false, misleading, or deceptive:

(1) Names (including those of law firms and professional associates), addresses, telephone numbers, and the designation "lawyer," "attorney," "law firm," or the like.

(2) Fields of practice, limitation of practice, or specialization.

(3) Fees for routine legal services, subject to the requirements of B&P C. 6157.2(d) (supra, §65) and the Rules of Professional Conduct.

(4) Date and place of birth.

(5) Dates and places of bar admissions.

(6) Schools attended, dates of graduation, degrees, and other scholastic distinctions.

(7) Public or quasi-public offices.

(8) Military service.

(9) Legal authorship.

(10) Legal teaching positions.

(11) Memberships, offices, and committee assignments in bar associations.

(12) Memberships and offices in legal fraternities and societies.

(13) Technical and professiional licenses.

(14) Memberships in scientific, technical, and professional associations and societies.

(15) Foreign language ability of the lawyer or a member of the lawyer's firm.

For violations of Business and Professions Code section 6158, an aggrieved party may file a complaint with the State Bar. Within 9 days after service of the complaint, the advertiser may voluntarily withdraw the advertisement and notify the State Bar of the withdrawal. (B&P C. 6158.4(a).) If the State Bar determines that there is substantial evidence of a violation, the attorney may withdraw the advertisement from broadcast within 72 hours of that determination. (B&P C. 6158.4(b)(1).) If the advertisement is withdrawn, no further action may be taken by the complainant. (B&P C. 6158.4(a), 6158.4(b)(1).)

The advertiser must provide a copy of the advertisement to the State Bar for review within 7 days of service of the complaint. Within 21 days from delivery, the State Bar must determine whether substantial evidence of a violation exists. (B&P C. 6158.4(a).)

If the State Bar determines that substantial evidence of a violation exists, and the attorney fails to withdraw the advertisement within 72 hours, a civil enforcement action may be commenced within 1 years of the State Bar decision. (B&P C. 6158.4(b)(2).)

If the State Bar determines that there is *no substantial evidence* of a violation, a civil enforcement may *not* be filed. (B&P C. 6158.4(b)(3).)

Violation of Business and Professions Code sections 6158, 6158.1 or 6158.3 is cause for disciplinary action by the State Bar. (B&P C. 6158.7.)

B. A comparison between 1983 Model Rules with California Rule 1-400[3]

These rules all address the extent to which lawyers may communicate to the public about their legal services. We address them together here because the California Rules have a single rule which addresses the subject, Cal. Rule 1-400. Moreover, under authority authorized by Cal. Rule 1-400(E), the State Bar of California has promulgated sixteen "standards" which were not subject to state supreme court approval. These standards raise a rebuttable presumption of a violation of the rules of conduct. Cal. B&P Code §§ 6150 - 6159 also address advertising and communication issues, including lawyer referral services.

Unlike the Model Rules, Cal. Rule 1-400 expressly defines the words "communication" and "solicitation." Moreover, Cal. B&P Code §6157 expressly defines the word "advertisement." Finally, Cal. Rule 1-400(C), prohibiting certain solicitations, expressly recognizes that some solicitations are protected by the constitutions of both the United States and the State of California. The rules thus pay specific deference to the series of United States Supreme Court opinions on the issues of lawyer advertising and solicitation.

MR 7.1: Like MR 7.1 on misleading communications, Cal. Rule 1-400 and Cal. B&P Code §6157.1 prohibit false or misleading communications. Regarding advertisements by electronic media, including radio, television and computer networks, Business and Professions Code section 6158 requires that the advertisement as a whole must not be false, misleading or deceptive and must be factually substantiated.

Cal. Rule 1-400 specifically prohibits communications that: 1) contain any untrue statement; 2) contain any matter, or present or arrange any matter in a manner or format which is false, deceptive or which tends to confuse, deceive or mislead the public; 3) fail to state facts necessary to make the communications not misleading; 4) fail to state expressly or in context that it is a solicitation; or 5) are coercive or harassing.

Cal. B&P Code §6157.2 specifically prohibits advertisements containing: 1) guarantees regarding the outcome of a matter; 2) statements about attorneys getting quick cash results; 3) impersonations or dramatization of the attorney or of clients without disclosure; 4) a spokesperson used without disclosure; and 5) statements concerning contingency fees unless the statements disclose the client's responsibility for costs. Several of the state bar standards appended to Cal. Rule 1-400 address these concerns as well. Unlike MR 7.1, neither the California rule nor the statutes directly prohibit a comparison of the attorney's services with those of another lawyer.

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[3] I am deeply indebted for the comparisons of ABA Model Rules 7.1–7.5, 1983 and 2003, to California Rule 1-400, to "Legal Ethics: Rules, Statutes and Comparisons" (2002-2003 Ed.) by Richard Zitrin, Carol Langford and Ellen Peck. I have quoted verbatim in Sections B. and C. from this wonderful text, "Rules Comparison," pp. 582–585.

MR 7.2: Like MR 7.2(b), Cal. Rule 1-400(F) requires that copies of communications be retained for two years, while the Cal. B&P Code §6159.1 requires retention of copies of advertisements for one year. Like MR 7.2(c), Cal. Rule 1-320 prohibits an attorney from compensating any person for recommending or securing clients and also prohibits an attorney from compensating the media in return for publicity.

Standard 12 to Cal. Rule 1-400 creates a presumption that a communication is misleading if it does not contain the name of at least one attorney responsible for it. This parallels MR 7.2(d). Cal. B&P Code §6157.3 requires that where an advertisement made on behalf of an attorney is paid for by someone other than the attorney, the business relationship between the attorney and that person must be disclosed.

MR 7.3: Like MR 7.3 on solicitation, Cal. Rule 1-400 prohibits in-person and telephone solicitation of clients with whom the attorney has no family or prior professional relationship, subject, however, to constitutional limitations. Like MR 7.3(c), Standard 5 to Cal. Rule 1-400 prohibits an unsolicited mailed communication which does not contain the words "Advertisement," "Newsletter" or the like. The standard details the manner of setting forth such words; however, it only creates a presumption that the communication is misleading.

MR 7.4: While Cal. Rule 1-400 does not address communication of fields of practice specifically, Cal. B&P Code §6158.2 presumes that such a communication is acceptable, so long as the communication as a whole is not false, misleading or deceptive. Regarding MR 7.4(c) on certified specialists, Standard 11 of Cal. Rule 1-400 creates a presumption that a communication is misleading unless it states the complete name of the entity which granted the certification as a specialist. However, there is no longer a limitation to State Bar certification programs.

MR 7.5: Several standards of Cal. Rule 1-400 create the presumption that a communication is misleading due to its reference to a firm name, trade name or fictitious name. These restrictions include stating or implying: 1) a relationship between an attorney and a government agency or legal services organization; and 2) that an attorney has a relationship to any other lawyer or law firm unless that relationship in fact exists.

The standards attached to Cal. Rule 1-400 create a number of other presumptions, not found in the Model Rules, that a communication is misleading where the communication: 1) contains guarantees, warranties or predictions regarding the result of the representation; 2) contains testimonials or endorsements with express disclaimers; 3) is delivered to a potential client whom the attorney knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment in retaining counsel; 4) is transmitted at the scene of an accident or the like; 5) implies that the attorney is participating in a lawyer referral service unless the service is State Bar certified; 6) contains a dramatization without a disclaimer; 7) states or implies "no fee without recovery" without disclosing whether the client will be liable for costs; 8) states or implies that an attorney is able to provide legal services in a language other than English unless the lawyer can actually provide legal services in that language or the communication also states the

employment title of the person who speaks such language; and 9) sets forth specific fees for a particular service where, in fact, the member charges a greater fee than advertised.

Cal. B&P Code §6158.1 also creates rebuttable presumptions, not found in the Model Rules, that an advertisement is misleading where it contains: 1) a message about the ultimate result; 2) displays or portrayals of injuries or accident scenes; and 3) a reference to money received for a client in a particular case or to potential monetary recovery for a prospective client.

C. A comparison between 2003 Model Rules with California Rule 1-400:

MR 7.1: The revision deleted from the definition of false and misleading communications those statements that are likely to create an unjustified expectation about results the lawyer can achieve; state or imply results achieved by means that violate the ethics rules or other law; or compare the lawyer's services with other lawyers' services. These rules have been made admonitions by adding Comments [2], [3], and [4]. California did not adopt these definitions.

MR 7.2: MR 7.2(a) deleted specific references to types of public media and added electronic media as a permissive means of lawyer advertising subject to the limitations in other advertising rules.

Former MR 7.2(b), requiring a lawyer to keep records of advertisements for a period of two years after distribution or broadcast, was deleted. Cal. Rule 1400(F) and Cal. B & P Code §6159 continue to require that copies of advertisements be maintained for two years and one year, respectively.

MR 7.2(b)(1) was amended to expand the permitted payments by a lawyer to include the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service "approved by an appropriate regulatory authority." This expansion makes the exception similar to Cal. Rule 1-320(A)(4), and B&P Code §§6155 et seq.

MR 7.2(b)(4)(i)(ii) was added to provide for lawyer referrals to another lawyer or nonlawyer pursuant to an agreement not otherwise prohibited under the Rules.

MR 7.3: MR 7.3(a) was amended to provide that in-person solicitation is committed when a lawyer solicits professional employment through "real-time electronic contact" (such as on-line real-time interactive chat rooms.) The amended rule also allows contact with other lawyers and close personal friends.

Cal. Rule 4-100(B) defines contact subject to the unlawful solicitation rule as being only personal or telephonic. Cal. Rule 4-100(C) continues to exempt only prior professional and familial relationships from the definition of a prospective client.

MR 7.3(b) adds electronic communication and real-time electronic contact to the means of contacting prospective clients that may be prohibited under the circumstances of the rule. Cal. Rule 1-400(A) and (D) contain similar prohibitions since all media communications, including electronic, are within the scope of the rule.

MR 7.4: MR 7.4(c), concerning what statements about certified specialties were permitted, was deleted in its entirety. New subd. (d) was added. It provides that a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law unless the organization that has been approved by appropriate state authority or accredited by the American Bar Association, and the name of the certifying organization is clearly identified. This provision is substantially similar to Cal. Rule 1-400(D)(6).

MR 7.5: No substantive changes to Model Rules.

CONCLUSION

If appears from a comparison of the 1983 Model Rules 7.1–7.5, the 2003 Model Rules 7.1–7.5, and Business and Professions Code section 6157, et seq., and section 6158, et seq., that California Rule 1-400, although not perfect, should remain intact. California Rule 1-400 is a single rule that addresses the subject of "Advertising and Solicitation." California Rule 1-400 is a model of simplicity and appears to have stood the test of time.

Respectfully submitted,

Edward P. George, Jr.

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INTER-OFFICE MEMORANDUM

TO: MEMBERS OF THE COMMISSION
FROM: A.M. VOOGD
RE: RULE 1-400
DATE: 4/18/03

After reading Ed George's comprehensive memorandum, I recommend we abrogate Rule 1-400, Advertising and Solicitation, and substitute rules following the language of ABA Model Rules (2003) 7.1 through 7.5. The recommendation is made for the following reasons:

1. Substantively, there is little or no difference between the ABA Rules and the California Rules.

2. The ABA Rules are better written and easier to understand. Accordingly, they provide better guidance to the profession.

3. The change would accord with the charter given the Commission by the Board of Governors to develop amendments that: "Eliminate and avoid unnecessary differences between California [and] other states fostering the evolution of a national standard with respect to professional responsibility issues."

4. Constitutional law has evolved sufficiently to render the saving language of subpart (C) archaic surplusage.

5. The original justification for making the Board of Governors an administrative agency charged with developing appropriate standards no longer exists as is evidenced by the absence of any changes to the standards since 1989. Moreover, there is no need for the presumption language in subpart (E).

6. As noted in my memorandum of March 25, 2003, solicitation prohibitions appear in Rule 1-320 (B) & (C) as well as Rule 1-400. Adoption of the ABA Rules will end this awkward and misleading split.